

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U. S. DISTRICT COURT
DISTRICT OF TEXAS
FILED
8/25/04
C. N. MILBY, CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK E. KOENIG,

Defendant.

No. CR-H-04-389
(Werlein, J.)

COOPERATION AGREEMENT

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Department of Justice by the Enron Task Force ("the Department") and Mark E. Koenig ("Defendant") agree to the following (the "Agreement"):

1. Defendant will plead guilty in the Southern District of Texas to an Information charging him with one count of aiding and abetting securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. § 2. Defendant agrees that he is pleading guilty because he is guilty, and that the facts contained in Exhibit A (attached and incorporated herein) are true and supply a factual basis for his plea. At the time it was committed by Defendant, the crime of aiding and abetting securities fraud carried the following statutory penalties:

sentenced to up to two years without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b) & (e))

- d. Maximum fine: \$1,000,000 (or twice the gross gain or loss) (15 U.S.C. § 78ff; 18 U.S.C. § 3571(d))
- e. Special Assessment: \$100 (18 U.S.C. § 3013)

Sentencing Guidelines

2. Defendant agrees that his sentence is governed by the United States Sentencing Guidelines (the "Guidelines"). Additionally, Defendant (a) waives any right to have facts that determine the offense level¹ under the Guidelines alleged in an indictment and found by a jury beyond a reasonable doubt, (b) agrees that the facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence, unless it is determined that this burden of proof cannot be waived, and that the court may consider any reliable evidence, including hearsay, and (c) waives any constitutional challenge to the validity of the Guidelines. The parties agree that Defendant's sentence is governed by the November 2000 Sentencing Guidelines Manual and that U.S.S.G. § 2F1.1 governs the determination of the applicable offense level. The Department agrees, based on information known to it on the date of this Agreement,

that (a) Defendant does not qualify for an affirmative role adjustment under U.S.S.G. § 2D1.1.

levels for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

3. The Department will advise the Court and the Probation Office of information relevant to sentencing, including criminal activity engaged in by Defendant, and all such information may be used by the Court in determining Defendant's sentence. Defendant understands that the parties' positions regarding the Sentencing Guidelines do not bind the Court and that the sentence imposed is within the discretion of the sentencing judge.

Waiver of Rights

4. Defendant will not appeal or collaterally attack his conviction or guilty plea. Defendant does not waive his right to appeal or collaterally attack his sentence based upon the law at the time of sentencing.

5. Defendant waives all defenses based on venue (but reserves the right to request a change of venue if his plea is vacated or withdrawn), speedy trial under the Constitution and Speedy Trial Act, and the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed. in the event that (a) Defendant's conviction is

later vacated for any reason, (b) Defendant violates any provision of this Agreement, or (c) Defendant's plea is later withdrawn. Defendant also waives his right to be charged by indictment returned by a duly constituted grand jury in the Southern District of Texas and consents to be charged by Information filed by the Acting United States Attorney.

6. Defendant understands that by pleading guilty he is waiving important rights including: (a) the right to enter a plea of not guilty; (b) the right to a jury trial with respect to guilt

right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; and (e) the right to additional discovery and disclosures from the Department. Defendant waives any right to additional disclosure from the Department in connection with his guilty plea.

Defendant's Obligations

7. Defendant will provide truthful, complete, and accurate information to and will cooperate fully with the Department. This cooperation will include, but is not limited to, the following:

- a. Defendant agrees to be fully debriefed and to attend all meetings at which his presence is requested by the Department, concerning his participation in and knowledge of all criminal activities.
- b. Defendant waives all claims of attorney-client privilege related to communications with any counsel for Enron in his capacity as an officer and employee of Enron.
- c. Except as required by law, Defendant agrees not to reveal any information derived from his cooperation to any third party (other than his counsel) without prior consent of the Department, and hereby instructs his attorneys to do the same. Defendant agrees to inform the Department of any attempt by any third party to interview, depose, or communicate in any way with him regarding this case, his cooperation, or any other information related to Enron or transactions involving Enron.
- d. Defendant agrees to testify at proceedings in the Southern District of Texas or elsewhere as requested by the Department.
- e. Defendant consents to adjournments of his sentencing hearing as requested by the Department and agrees that his obligations under this Agreement continue until the Department informs him in writing that his cooperation is concluded.

8. The Department and Defendant agree that Defendant's counsel may be present at any meetings or debriefings between Defendant and the Department, and the Department will

endeavor to provide reasonable notice of such meetings or debriefings, but counsel's presence is not required and, if necessary, Defendant agrees to be present and cooperate notwithstanding his counsel's unavailability.

9. Defendant agrees not to accept remuneration or compensation of any sort, directly or indirectly, for the dissemination through books, articles, speeches, interviews, or any other means, of information regarding his work at Enron or the investigation or prosecution of any civil or criminal cases against him.

The Department's Obligations

10. The Department agrees that, except as provided in paragraphs 1, 5, and 19 (breach of agreement), no further criminal charges will be brought against Defendant for any heretofore disclosed crime in which he engaged in his capacity as an officer and employee of Enron.

11. The Department further agrees that no statements made by Defendant during the course of his cooperation will be used against him in any criminal proceedings instituted by the Department, except as provided in paragraphs 1, 3, 5, and 19.

12. If the Department determines, in its sole and exclusive discretion, that Defendant has cooperated fully, provided substantial assistance to law enforcement authorities, and otherwise complied with the terms of this Agreement, the Department will file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) with the sentencing court setting forth the nature and extent of Defendant's cooperation. In this connection, Defendant understands that a determination by the Department as to whether Defendant has cooperated fully, provided substantial assistance, and otherwise complied with this Agreement, as well as the Department's assessment of the value, truthfulness, completeness, and accuracy of the cooperation, is binding

instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Defendant acknowledges that he understands that the forfeiture of assets is part of the sentence that may be imposed in this case and waives any failure by the court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted. Defendant further agrees to waive all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. Defendant agrees to take all steps as requested by the United States to pass clear title to the forfeitable assets to the United States, and to testify truthfully in any judicial proceeding. Defendant agrees not to seek a refund from the United States Treasury of the amount that he paid in taxes in connection with the receipt of \$746,736.00 in proceeds from the offense to which he will plead guilty, and waives his right, title, and interest to the taxes paid on that amount.

15. Defendant agrees to pay the penalty prescribed in his separate agreement with the Securities and Exchange Commission ("SEC"), a total of \$746,836.00. Defendant agrees to make this payment to the SEC in full within five business days of entering his guilty plea.

16. The Department agrees that, provided Defendant fulfills his obligations pursuant to paragraphs 14 and 15 of this agreement, it will recommend that no additional fine, forfeiture or restitution be ordered by the Court against Defendant at the time Defendant is sentenced. The Department agrees that this amount is appropriate and fully satisfies the fine, forfeiture and restitution provisions of the law. Defendant understands that the Department's recommendation is not binding on the Court or the Probation Department, and the Court may order Defendant to

pay an additional fine, forfeiture, or restitution notwithstanding the Department's recommendation. Should the Court order Defendant to pay additional forfeiture sums, restitution, or a fine, he will not be permitted on that basis to withdraw his guilty plea.

Bankruptcy Waiver

17. Defendant agrees not to avoid or attempt to avoid paying any fine or restitution imposed by the Court in this proceeding, or the penalty prescribed in his separate agreement with the SEC, through any proceeding pursuant to the United States Bankruptcy Code. Defendant waives all rights, if any, to obtain discharge or to delay payment of any fine or restitution obligation arising from this proceeding or any proceeding brought by the SEC, or alter the time for payment by filing a petition pursuant to the Bankruptcy Code. Defendant stipulates that enforcement of any fine or restitution obligation arising from this proceeding by the Department or from a proceeding brought by the SEC is not barred or affected by the automatic stay provisions of the United States Bankruptcy Code and that enforcement of any fine or restitution obligation arising from this proceeding by the Department or any proceeding by the SEC is a valid exercise of its police or regulatory power within the meaning of Title 11, United States Code, Section 362(b). Defendant stipulates and agrees not to institute or participate in any proceeding to interfere with, alter, or bar enforcement of any fine or restitution obligation arising from this proceeding or any proceeding by the SEC pursuant to the automatic stay or other provision of the Bankruptcy Code in any case filed by Defendant or her creditors. Upon request of the Department or the SEC, Defendant will execute a stipulation granting the Department or the SEC relief from the automatic stay or other Bankruptcy Code provisions in order to enforce any fine or restitution obligation arising from this proceeding. Defendant stipulates that any fine or restitution obligation arising from this proceeding shall be paid in full by the date of the

or restitution obligation imposed by the Court in this proceeding or in any proceeding filed by the SEC is not dischargeable pursuant to Title 11, United States Code, Section 523 in any case commenced by Defendant or his creditors pursuant to the Bankruptcy Code. Defendant's waivers, stipulations, and agreements set forth in this paragraph are made in exchange for the Department's entering into this Agreement.

18. Defendant agrees that with respect to all charges referred to in this Agreement he is not a "prevailing party" within the meaning of the "Hyde Amendment." Section 617, PL 105-119 (Nov. 16, 1997), and will not file any claim under that law. Defendant waives any right to additional disclosure from the government in connection with the guilty plea.

Breach of Agreement

19. Defendant must at all times give complete, truthful, and accurate information and testimony, and must not commit, or attempt to commit, any further crimes, including but not limited to perjury, making false statements, and obstruction of justice. Should Defendant violate any provision of this Agreement, Defendant will not be released from his guilty plea but the Department will be released from all its obligations under this Agreement, including its promise not to prosecute Defendant for any offenses arising from his employment at Enron. Defendant agrees that, in any such prosecution, all statements and other information that he has provided at any time, including all statements he has made and all evidence he has produced during proffers, interviews, testimony, and otherwise, may be used against him, regardless of any constitutional provision, statute, rule, prior agreement, or other term of this Agreement to the contrary.

Forfeiture Notice Waiver

20. Defendant acknowledges his receipt of notice that the Department will seek forfeiture

of property as part of his sentence and waives formal notice in the Information of the forfeiture pursuant to Federal Rule of Criminal Procedure 32.2(a).

Scope

21. This Agreement does not bind any federal, state, or local prosecuting authority other than the Department, and does not prohibit the Department or any other department, agency, or commission of the United States from initiating or prosecuting any civil, administrative, or tax proceedings directly or indirectly involving Defendant.

Complete Agreement

22. Apart from the written proffer agreements originally dated June 28, July 1, and August 4, 2004, no promises, agreements or conditions have been entered into by the parties other than those set forth in this Agreement and none will be entered into unless memorialized in writing and signed by all parties. This Agreement supersedes all prior promises, agreements, or conditions between the parties, including the written proffer agreements. To become effective, this Agreement must be signed by all signatories listed below and in the addenda.

Dated: Houston, Texas
August 25, 2004

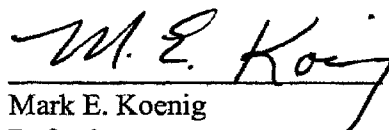
ANDREW WEISSMANN
Director, Enron Task Force

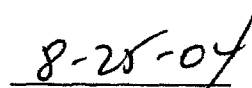
By: Kathryn H. Ruemmler
Kathryn H. Ruemmler
Assistant United States Attorney
Enron Task Force

ADDENDUM FOR DEFENDANT KOENIG

I have consulted with my attorneys and fully understand all my rights with respect to the Information filed by the United States Department of Justice, including my right to be charged by indictment returned by a grand jury in the Southern District of Texas. I have consulted with my

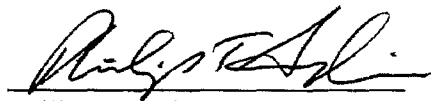
attorneys and fully understand all my rights with respect to the provisions of the U.S. Sentencing Commission's Guidelines Manual which may apply in my case. I have read this Agreement and carefully reviewed every part of it with my attorneys. No promises have been made to me by the Department except as set forth in this Agreement. I waive my right to be charged by indictment. I understand this Agreement and I voluntarily agree to it.


Mark E. Koenig
Defendant


Date

ADDENDUM FOR DEFENSE COUNSEL

I have fully explained to Defendant Mark E. Koenig his rights with respect to the pending Information filed by the United States Department of Justice, including his right to be charged by indictment returned by a grand jury in the Southern District of Texas. I have reviewed with Mr. Koenig the provisions of the U.S. Sentencing Commission's Guidelines Manual and I have fully explained to him the provisions of those Guidelines which may apply in this case. I have carefully reviewed with Mr. Koenig every part of this Agreement. To my knowledge, Mr. Koenig's decision to waive indictment and enter into this Agreement is an informed and voluntary one.



Philip T. Inglima, Esq.
Attorney for Defendant Koenig

8-25-04

Date